JB Kulim Development Sdn Bhd v Great Purpose Sdn Bhd

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–1124 OF 2001
BALIA YUSOF JC
7 FEBRUARY 2002

Companies and Corporations *— Winding up — Statutory demand — Application for injunction to restrain defendant from filing winding up petition — Whether plaintiff had to establish a prima facie case instead of merely a bona fide serious issue to be tried — Whether bona fide dispute to debt — Whether dispute as to amount of debt was sufficient to dismiss winding up petition if debt exceeded statutory amount of RM500*

Evidence *— Without prejudice communications — Admissibility — Plaintiff had introduced documents made on 'without prejudice' basis — Whether introduction of 'without prejudice' documents by plaintiff was tantamount to waiver on its part*

The plaintiff was a housing developer in respect of a housing project in Alor Setar. The plaintiff appointed the defendant as its contractor to construct houses in the housing project. Disputes subsequently arose between the parties as to the progress of the housing project. The defendant then served on the plaintiff a notice under s 218 of the Companies Act 1965 ('the Act') demanding a sum of money allegedly due under interim certificates issued by the architect in respect of the work done by the defendant ('the debt'). This was the plaintiff's application to restrain the defendant from filing a winding up petition. Alternatively, the plaintiff also sought to restrain the defendant from serving the petition until the plaintiff's claim against the defendant in a civil suit to be filed had been determined by the court and from advertising the petition. The issue for determination was whether the plaintiff may obtain an injunction against the impending threat of a winding up petition brought by the defendant based on a notice issued under s 218 of the Act and the standard of proof or test required of the plaintiff to succeed in such an application.

Held, dismissing the application:

(1) The plaintiff had to prove not merely a bona fide serious issue to be tried but to establish a prima facie case (see p 306A); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193 distinguished.

(2) The affidavits filed by the plaintiff clearly indicated that there was an admission of the debt by the plaintiff. Further, in the defendant's affidavit, the defendant had exhibited documents wherein the plaintiff had admitted the indebtedness and had undertaken to secure payments to the defendant ('the documents'). The documents stood uncontroverted and unchallenged by the plaintiff and in the evaluation of affidavit evidence, the failure of a party to contradict his opponent was

usually treated as an admission by that party of the fact so asserted (see pp 306G–H, 307B–C).

(3) In the instant case, the plaintiff's indebtedness to the defendant was a material issue and there was failure on the part of the plaintiff to contradict it. The documents, taken in its totality pointed to the fact that the plaintiff was indebted to the defendant and that there was no bona fide dispute to the debt. Even if the plaintiff did not admit the full content of the documents, the documents were sufficient to prove the debt (see p 307D–E, I).

(4) The plaintiff merely disputed the amount of the debt owed to the defendant. A dispute as to the amount of the debt was insufficient ground to dismiss a winding up petition so long as it exceeded the statutory amount of RM500 and here, the amount of debt admitted by the plaintiff far exceeded the statutory amount of RM500 (see p 308A, H–I).

(5) The plaintiff's real complaint related to the quality of work done and the plaintiff's attempt to bring up these issues to restrain the defendant from pursuing the winding up action was not bona fide. Further, there was no bona fide dispute on the debt. Therefore, the plaintiff had failed to establish a prima facie case against the defendant (see p 309D).

(6) The plaintiff's right to file an injunction was never in question and the plaintiff did not have to wait for the actual petition for winding up to be filed and served on it. Likewise the defendant who had duly served a notice under s 218 of the Act had every right to file a winding up petition the moment there was a failure to pay within 21 days therefrom, as by then, the plaintiff would be deemed to be unable to pay its debt under s 218(2)(a) of the Act (see p 310B, D).

(7) To grant an injunction under the circumstances of this case would be oppressive to the defendant as the injunction would be perpetual in its effect. Further, the plaintiff had not given any undertaking that it would file an action against the defendant. In addition, in the plaintiff's affidavit, it had failed to disclose its admission of indebtedness and had failed to make a full and frank disclosure about that material fact. In this regard, the maxim 'he who comes into equity must come with clean hands' was applicable in considering the plaintiff's conduct and the plaintiff's conduct did not augur well for a person who was seeking equity (see p 310E–H); *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465 followed.

(8) The plaintiff had introduced documents made on a 'without prejudice' basis, wherein settlement proposals were made by the plaintiff. In view of the fact that it was the plaintiff who had introduced the 'without prejudice' documents, there was waiver on its part and accordingly, those 'without prejudice' documents

were admissible (see p 311A–D); *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722 followed. A

[**Bahasa Malaysia summary**

Plaintif adalah pemaju perumahan sebuah projek perumahan di Alor Setar. Plaintif telah melantik defendan sebagai kontraktornya untuk membina rumah-rumah di projek perumahan tersebut. Pertikaian kemudiannya berbangkit antara pihak-pihak tersebut berhubung dengan kemajuan projek perumahan tersebut. Defendan kemudiannya telah menyampaikan ke atas plaintif satu notis di bawah s 218 Akta Syarikat 1965 ('Akta tersebut') menuntut satu jumlah wang yang dikatakan kena dibayar di bawah sijil-sijil interim yang dikeluarkan oleh arkitek berhubung dengan kerja yang telah dilakukan oleh defendan ('hutang tersebut'). Ini merupakan permohonan plaintif untuk menghalang defendan daripada memfailkan satu petisyen penggulungan. Secara alternatifnya, plaintif juga cuba untuk menghalang defendan daripada menyampaikan petisyen tersebut sehingga tuntutan plaintif terhadap defendan dalam satu guaman sivil yang akan difailkan telah ditentukan oleh mahkamah dan daripada mengiklankan petisyen tersebut. Isu untuk penentuan adalah sama ada plaintif boleh mendapatkan satu injunksi terhadap ugutan petisyen penggulungan yang akan menimpa yang telah dimulakan oleh defendan berdasarkan satu notis yang dikeluarkan di bawah s 218 Akta tersebut dan standard bukti atau ujian yang dikehendaki dari plaintif untuk berjaya di dalam permohonan yang sedemikian.

Diputuskan, menolak permohonan tersebut:

(1) Plaintif terpaksa untuk membuktikan bukan hanya isu serius yang bona fide untuk dibicarakan tetapi untuk menentukan satu kes prima facie (lihat ms 306A); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193 dibeza.

(2) Afidavit-afidavit yang difailkan oleh plaintif jelas menunjukkan bahawea terdapatnya pengakuan mengenai hutang tersebut oleh plaintif. Selanjutnya, di dalam afidavit defendan, defendan telah mengekshibitkan dokumen-dokumen di mana plaintif telah mengakui keterhutangan tersebut dan telah mengakujanji untuk menjamin pembayartan-pembayaran kepada defendan ('dokumen-dokumen tersebut'). Dokumen-dokumen tersebut kekal tidak diperkatakan dan dicabar oleh plaintif dan dalam penilaian keterangan afidavit, kegagalan sesuatu pihak untuk menyangkal pihak lawannya adalah selalunya dianggap sebagai suatu pengakuan oleh pihak itu akan fakta yang ditegaskan sedemikian (lihat ms 306G–H, 307B–C).

(3) Dalam kes semasa, keterhutangan plaintif kepada defendan merupakan isu yang material dan terdapat kegagalan dipihak plaintif untuk menyangkalnya. Dokumen-dokumen tersebut,

yang dirunjuk secara keseluruhannya menunjukkan fakta bahawa plaintif terhutang kepada defendan dan bahawa tidak terdapat pertikaian bona fide kepada hutang tersebut. Meskipun jika plaintif tidak mengakui kandungan sepenuhnya dokumen-dokumen tersebut, dokumen-dokumen tersebut adalah memadai untuk membuktikan hutang itu (lihat ms 307D–E, I).

(4) Plaintif hanya mempertikaikan jumlah hutang yang terhutang kepada defendan. Suatu pertikaian berhubung jumlah hutang tersebut adalah alasan yang tidak memadai untuk menolak petisyen penggulungan asalkan ianya melebihi jumlah statutori sebanyak RM500 dan di sini, jumlah hutang yang diakui oleh plaintif jauh melebihi jumlah statutori sebanyak RM500 (lihat ms 308A, H–I).

(5) Aduan sebenar plaintif berkaitan dengan mutu kerja yang dilakukan dan percubaan plaintif untuk mengemukakan isu-isu ini untuk menghalang defendan daripada meneruskan tindakan penggulungan tersebut adalah tidak bona fide. Selanjutnya, tidak terdapat pertikaian bona fide atas hutang tersebut. Oleh itu, plaintif telah gagal untuk menentukan kes prima facie terhadap defendan (lihat ms 309D).

(6) Hak plaintif untuk memfailkan satu injunksi tidak pernah dipersoalkan dan plaintif tidak perlu menunggu petisyen penggulungan yang sebenarnya difailkan dan disampaikan ke atasnya. Begitu juga defendan yang telah menyampaikan satu notis di bawah s 218 Akta tersebut mempunyai hak untuk memfailkan petisyen penggulungan sejurus selepas berlakukan kegagalan untuk membayar dalam tempoh 21 hari daripadanya, kerana sehingga masa itu, plaintif akan dianggap sebagai tidak berkeupayaan untuk membayar hutangnya di bawah s 218(2)(a) Akta tersebut (lihat ms 310B, D).

(7) Memberikan satu injunksi di bawah keadaan-keadaan kes ini akan menindas defendan kerana injunksi tersebut akan mempunyai kesan yang berterusan. Selanjutnya, plaintif telah tidak memberikan sebarang akujanji bahawa ianya akan memfailkan satu tindakan terhadap defendan. Tambahan pula, dalam afidavit plaintif, ianya telah gagal mendedahkan pengakuannya mengenai keterhutangan dan telah gagal membuat pendedahan sepenuhnya dan yang nyata mengenai fakta material itu. Berhubung dengan perkara ini, ungkapan 'he who comes into equity must come with clean hands' boleh dipakai dalam mempertimbangkan perlakuan plaintif dan kelakuan plaintif tidak memberikan petanda baik bagi seseorang yang cuba memohon ekuiti (lihat ms 310E–H); *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465 diikut.

(8) Plaintif telah memperkenalkan dokumen-dokumen yang dibuat atas dasar 'tanpa memudaratkan', dalam mana cadangan-cadangan penyelesaian telah dibuat oleh plaintif. Memandangkan

fakta bahawa ianya merupakan plaintif yang telah memperkenalkan dokumen-dokumen 'tanpa memudaratkan' tersebut, terdapat pengenepian di pihaknya dan sehubungan itu, dokumen-dokumen 'tanpa memudaratkan' itu boleh diterima; *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722 diikut (lihat ms 311A–D).]

Notes

For cases on winding up upon statutory demand, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1116–1117.

For cases on admissibility of without prejudice communications, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2039–2046.

Cases referred to

Anglian Sales Ltd v South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 (refd)

Bryanston Finance Ltd v de Vries (No 2) [1976] 1 All ER 25 (refd)

Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)

Commonwealth Bank of Australia v Individual Homes Pty Ltd (1994) 119 ACTR 1 (refd)

Dikwa Holdings Pty Ltd v Oakbury Pty Ltd (1992) 8 ACSR 53 (refd)

Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors [1999] 5 MLJ 449 (refd)

Instrument Engineering Sdn Bhd v Sensor Link Sdn Bhd [2001] 1 MLJ 127 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (distd)

Lim Tjoen Kong v A-B Chew Investments Pte Ltd [1991] 3 MLJ 4 (refd)

Malayan Banking Bhd v Red Box (M) Bhd [2000] 6 CLJ 21 (refd)

Natseven TV Sdn Bhd v Television New Zealand Ltd [2001] 4 CLJ 722 (folld)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Perpetual Plantations of Australia Ltd v United Tree Farmers Ltd (1993) 10 ACSR 82 (refd)

Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd [2000] 3 MLJ 465 (folld)

Tweeds Garages Ltd, Re [1962] 1 Ch 406 (refd)

Legislation referred to

Companies Act 1965 s 218(2)(a)

Ravi Chandra (A Nagarajan & Co) for the plaintiff.
JT Chong (JT Chong & Associates) for the defendant.

Balia Yusof JC: This is an application by the plaintiff to restrain the defendant from filing a winding up petition after being served with a

A statutory notice under s 218 of the Companies Act 1965 ('the Act'). Alternatively, the plaintiff is also seeking to restrain the defendant from serving the petition until the plaintiff's claim against the defendant in a civil suit to be filed has been determined by the court, and also to restrain the defendant from advertising the said petition. Preceding this application, the defendant had through a notice dated 28 September 2001, notified the B plaintiff that the sum of RM888,009.79 is due and owing to the defendant, and the plaintiff was further notified that failure to make payment of the said sum within 21 days from the date of service of the notice, the plaintiff would be deemed unable to pay its debts pursuant to s 218(2)(a) of the Act, and proceedings will thereafter be commenced to wind up the plaintiff pursuant to the provisions of the said Act. C

As the events unfold, it is revealed that a second notice under s 218 of the Act dated 15 November 2001 was served on the plaintiff. This second notice was necessitated by the adjustment made by the architect and thus claiming a total sum of RM853,051.79. The petition for winding up was subsequently filed by the defendant based on this reduced figure. D

The application of the plaintiff was filed on 27 October 2001 and supported by an affidavit affirmed by one Nawab Rajah KAM Abdul Kader the General Manager of the plaintiff on the same date, and a further affidavit was filed on 2 January 2002. The plaintiff also filed a perakuan segera on 30 December 2001 and the matter was fixed for hearing on E 21 January 2002. The defendant, in reply, filed two affidavits affirmed by one Phoo Meng Khaw, the managing director of the defendant, encll 8 and 17 were filed on 20 December 2001 and 10 January 2002 respectively. The court heard the submissions of the plaintiff on 21 January 2002 and adjourned it to 23 January 2002 to hear the submissions of the defendant. Before hearing the submissions of the parties, the court had earlier ruled F that despite encl 13, the court could proceed to hear submissions of the parties on the applications for the injunction. Enclosure 13 is an application by the defendant to strike out the plaintiff's application which has been fixed for hearing before the registrar on 13 March 2002.

The plaintiff submitted a written reply to the defendant's submission on G 29 January 2002 and the defendant submitted its submission in reply on 4 February 2002. In the meantime, the court fixed this matter for decision on 7 February 2002.

The plaintiff is a developer of Taman Seri Marina, Mukim Kuala Muda, Daerah Kota Setar and the defendant was appointed as the contractor to the H said project. The project consisted of two packages to build various types of houses and two separate agreements were entered into between the parties on 1 May 2000 and 14 May 2001 respectively. The value of the package one project was RM3,399,320, while the package two project was valued at RM11,098,800. The letter of award for the package one project was given on 7 August 1999 to build 168 units of low cost and low medium single storey I houses, while under the package two project, the letter of award of tender was issued on 30 December 1999 to build 84 units of single storey terrace houses, 37 units of double storey terrace houses, 14 units of double storey semi

detached houses, 80 units of single storey semi detached houses, 6 units of double storey shophouses type 'A' and 7 units of double storey shop houses type 'B'. The contract period under the package one project was from 15 August 1999 to 14 August 2000, while the contract period for the package two project was from 1 January 2000 to 30 June 2001. Both projects encountered problems as the result of which the contract period for both were extended to 30 March 2001 and 30 December 2001 for package one and two respectively. As evidenced from the various affidavits filed by the parties, disputes arose between the parties as to the progress of the project itself, the quality of work as well as the problem of payments, each party putting the blame on the other. The differences between the parties came to a climax when on 21 November 2000, the plaintiff went on site and took over the project. Prior to this incident, the defendant had served a s 218 notice vide a notice dated 28 September 2001 on the plaintiff demanding a sum of RM888,009.79. This figure was subsequently adjusted and by a new notice dated 15 November 2001, a sum of RM853,051.79 was demanded from the plaintiff. It was based on this notice that a winding up petition against the plaintiff was filed on 12 December 2001. As intimated earlier, the plaintiff had on 27 October 2001, filed an originating summons seeking for an order, among others, to restrain the defendant from proceeding with the winding up action.

The issue that arises for determination in this case is whether the plaintiff may obtain an injunction against the impending threat of a winding up petition brought by the defendant based on a notice issued under s 218 of the Act, and what the standard of proof or test required of the plaintiff to succeed in such an application is.

In *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722, Low Hop Bing J stated at p 731:

> In order to succeed in an application for injunctive relief to restrain the defendant from proceeding with the winding up petition, I am of the view that the standard of proof or test required of the plaintiff is to establish a prima facie case and not merely a serious question to be tried. I am fortified in this view by a number of authorities. In *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25 (CA), the defendant held 62 shares in a company whose issued capital was more than seven million shares. The company applied for an injunction restraining the defendant from presenting a winding up petition. The judge of the first instance held that he should decide whether to grant the injunction on the balance of convenience, obviously relying on the test applied by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and then granted the injunction. On appeal, the Court of Appeal held, inter alia, that the plaintiff company was only entitled to interlocutory relief to prevent anticipated litigation if on the available evidence it could said that presentation of a petition would prima facie be an abuse of process. In other words, the court should not interfere with what otherwise be a legitimate petition unless there were sufficient prima facie evidence.

At p 733, his Lordship held that:

> ... for the purposes of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof

A cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a prima facie case and that the principle relating to the test of 'serious question to be tried' in *American Cyanamid*, as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.

B

A similar view was also expressed by Abdul Malik Ishak J in the case of *Malayan Banking Bhd v Red Box (M) Bhd* [2000] 6 CLJ 21 where his Lordship held:

C By virtue of *Bryanston Finance Ltd* and *Anglian Sales Ltd*, the burden was on the respondent to establish a prima facie case to support the notice of motion in encl 14. The onus on the respondent was not merely to raise a serious question to be tried as envisaged by Lord Diplock in *American Cyanamid* [1975] AC 396 but the respondent has the added responsibility by way of a higher standard of proof to convince me in regard to the notice of motion in encl 14 (*Bryanston Finance Ltd* and *Cylian Sales Ltd*).

D In the course of the plaintiff's counsel's submission, it has been urged before me that the Court of Appeal's decision in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 must be relied upon in deciding whether or not to grant an injunction. Gopal Sri Ram JCA at p 206 held that a judge hearing an application for an interlocutory injunction should:

E

(1) ... ask himself whether the totality of the facts presented before him disclose[d] a bona fide serious issue to be tried. He must ... refrain from making any determination on the merits of the claim or any defence to it ... [and] identif[y] with precision the issue raised ... and decide whether the[y] are serious enough to merit a trial. If he finds ... that no serious F question is disclosed, ... the relief [should be] refused. [If however,] he ... find[s] that there are serious questions to be tried, he should move on to the next step of his inquiry.

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. ... [H]e must take into account all relevant matters, including the practical G realities of the case before him ... [and] weigh the harm the injunction would produce by its grant against the harm that would result from its refusal. ... If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater H injustice by the grant of injunction, he would be entitled to refuse the relief ...;

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and ... to maintain the status quo. ... It is a judicial discretion capable of I correction on appeal. ... A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

Having studied the decisions of these three cases, I am of the view that the plaintiff in this case has to prove not merely bona fide serious issues to be tried but to establish a prima facie case. I further hold that the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable in that the injunction that was sought for in that case was for restraining the defendant from entering into a parcel of timber concession and to prevent the defendant from giving effect to any agreement relating to the timber concession. That injunction was not to restrain the exercise of any statutory rights. Speaking of statutory rights, Chin Fook Yen J in the case of *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465 also referred to *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25 (CA) and the New Zealand Court of Appeal case of *Anglian Sales Ltd v South Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249 and stated the following:

> These are strong persuasive authorities from the Commonwealth countries. With the greatest respect, I agree and accept them to apply in the instant case. Whether it is an application to prevent the presentation of a petition or to strike out a petition the basis is the same, ie an abuse of process. It will not alter the nature of the proceedings. The order at the end of the day, if allowed, is one of dismissal without hearing. In recent trend, invariably when a petition is served there will be an application by the company to strike out the same and in some instances, if not already presented, application to restrain the petitioning. My view, therefore, is that the right to present petition to wind up a company is a statutory right and cannot be taken away simply, unless the company can seriously challenge that the petition is bound to fail in its claim. A challenger may well be reminded that the task will be heavy, because 'if a challenge were allowed in circumstances short of this, the court would in effect be refusing to give effect to the very right which the statute has conferred upon a creditor to have the petition itself considered.

The above case is a winding up petition brought by the petitioner based on the company failing to make payment of sums certified in interim certificates issued to the company, and the company applied by way of motion to strike out the petition. With the greatest respect, I agree with the learned judge and hold that the task of restraining a winding up petition is a heavy one. The defendant's action of filing a winding up petition based on a notice under s 218 of the Act is an exercise of its statutory right and this right ought not to be taken away simply.

I next turn to the issue of whether the plaintiff has established a prima facie case against the defendant. A perusal of the affidavits filed by the plaintiff in support of its application clearly indicates that there is an admission of the debt by the plaintiff. It is submitted before me that exh PMK 9 is a clear admission of indebtedness by the plaintiff wherein the plaintiff undertakes to use its best endeavours to secure payments to the defendant. I cannot also ignore exh PMK 25, also in the defendant's affidavit which clearly and unequivocally admits that indebtedness. Again through a letter dated 19 September 2001 addressed to the architect and copied to the plaintiff, the minutes of meeting between the parties in this case and exhibited as exh PMK 30 is a clear manifestation of the plaintiff's

indebtedness to the defendant. I pause here to observe that all these documents are exhibited in the defendant's affidavit and they stand uncontroverted and unchallenged by the plaintiff. The plaintiff did in their 'afidavit balasan plaintif' mention exh PMK 25, but never denied its content and admitted that it was a conditional admission of debt. On exh PMK 9, the plaintiff did not even deem it fit to refer to the relevant part of that document suggesting to use its best endeavour to secure payment, and no attempt whatsoever has been made by the plaintiff to controvert exh PMK 30.

It is trite law that in the evaluation of affidavit evidence, the failure of a party to contradict his opponent is usually treated as an admission by that party of the fact so asserted. The Court of Appeal in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 held at p 286:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brian & Anor* [1988] 3 MLJ 332.

The plaintiff's indebtedness to the defendant is a material issue in the instant case and there is failure on the part of the plaintiff to contradict it. These documents, taken in its totality, point to one fact, namely that the plaintiff is indebted to the defendant and that there is no bona fide dispute to such debt. There are abundant authorities to support this view. In *Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447, the facts disclosed that the respondent company in its affidavit in support of its application for injunction, admitted that it owed the appellant and stated that it was ready to pay the sum. The High Court granted the injunction restraining the appellants from advertising the petition. On appeal, the Supreme Court allowed the appeal and the injunction was set aside. In *Malayan Banking Bhd v Red Box (M) Bhd* [2000] 6 CLJ 21, Abdul Malik Ishak J dismissed an application by the company to restrain a winding up petition on, among others, the ground that there had been an admission of the debt. At p 41, his Lordship went on further to state that:

> An admission of a particular fact my either be express or implied. In whatever form it takes, the admission must be clear and unequivocal (*Ellis v Allen* [1914] 1 Ch 904 at p 909; *Ash v Hutchinson & Co (Publishers)* [1936] Ch 489 at p 503; and *Technistudy v Kelland* [1976] 1 WLR 1042 [1976] 2 All ER 632 (CA)) Thus, if a defendant admits a document but does not admit its full contents, the plaintiff may still succeed by obtaining judgment if the document, on production, clearly establishes and supports the plaintiff's claim (*Barnard v Wieland* (1882) 30 WR 947; *Rutter v Tregent* (1879) 12 Ch D 758; and *Smith v Davies* (1884) 22 Ch D 650).

As stated earlier in my finding as to exhs PMK 9, PMK 25 and PMK 30, these documents clearly support and establish the plaintiff's indebtedness to the defendant, and even if the plaintiff does not admit its full content, they are sufficient to prove its debt. What seems to be clear in this case is that the

plaintiff merely disputes the amount of the debt owed to the defendant and that is not a sufficient ground to restrain the defendant from proceeding with the winding up action. An authority to support this view is readily available from the decision of the Supreme Court in *Chip Yew Brick Works Sdn Bhd*, which had this to say:

> Although in the letter 'J' referred to by the learned Judge the respondent company disputed the appellant's claim for RM127,159, in its affidavits in support of its application for injunction the respondent company admitted that it owed the appellant a sum of RM60,580 and stated that it was at all times ready and willing to pay this sum. In our judgment, as the debt of RM60,580 is not disputed the respondent company is caught under s 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order to winding up is made the respondent company can still defend on the balance amount in dispute. Under the Act the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is disputed the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

Again, in *Sri Binaraya Sdn Bhd* at p 478, Chin Fook Yen J stated:

> I do not think the company's dispute herein is bona fide and on substantial grounds. In the Court of Appeal case of *YPJE Consultancy Services Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482, the question that arose for consideration was whether the court should dismiss the application for winding up because the amount which was demanded in the statutory notice was 'incorrect or unclear'. His Lordship Ahmad Fairuz JCA, after reviewing cases from overseas, held that so long as the amount exceeded the quantum of RM500 it was legitimate to look at the circumstances in order to determine whether the company was unable to pay its debt.

The cases referred to by his Lordship Ahmad Fairuz JCA were *Re Tweeds Garages Ltd* [1962] 1 Ch 406, *Commonwealth Bank of Australia v Individual Homes Pty Ltd* (1994) 119 ACTR 1 and *Dikwa Holdings Pty Ltd v Oakbury Pty Ltd* (1992) 8 ACSR 53.

All these cases are company winding up cases and the rationale that has been expounded in these cases illustrate the view, which I am in concurrence with, that a dispute as to the amount of the debt is an insufficient ground to dismiss a winding up petition so long it exceeds the statutory amount of RM500. Applying this principle to the plaintiff in our present case, I am of the considered view that a dispute as to the exact amount of the debt owed to the defendant is not a sufficient ground to

A restrain the defendant from proceeding with the winding up action. The amount of debt admitted by the plaintiff far exceeds the statutory amount of RM500.

The grounds relied upon by the plaintiff in its argument to obtain an injunction against the defendant's winding up action is based mainly on the B complaint against the defendant's defective work, the delay, and failure to comply with the plaintiff's instruction. The plaintiff also argued that the claim being based on interim certificates, is not a final claim and that the plaintiff has a right to set off against the defendant. From the evidence adduced, the contract in the instant case was extended not once but twice and both parties agreed to it. All along in the course of the dealing between C the two parties and with the extension of the contract, these issues took a centre stage. This led the parties to blame each other, culminating in the plaintiff taking over the worksite and the defendant serving a notice under s 218 of the Act. From the facts disclosed, it is evident that the real complaint of the plaintiff is one relating to the quality of work and the plaintiff having problems with cash flow, resulting in either slow or non- D payment for the work done by the defendant.

In its totality, I find that the attempt by the plaintiff to bring up these issues to restrain the defendant from pursuing its winding up action is not bona fide and there is further no bona fide dispute on the debt. The plaintiff therefore has failed to establish a prima facie case against the defendant.

E On interim certificates which form the basis of the defendant's claim against the plaintiff, it was strenuously argued before me that by its nature, which is not conclusive, it could not be used as evidence to wind up a company. In dealing with this issue, I need not go further than just by referring to a passage from the judgment of Chin Fook Yen J in the case of F *Sri Binaraya Sdn Bhd* at p 480:

> In the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, the Supreme Court there was called upon to determine the question under cl 30(1) as to when the amount certified in an interim certificate became due and payable. In the case, the period for the honouring of interim certificates issued under cl 30(1) was 21 days from date G of presentation thereof to the employer. In other words, although the right to payment of the sum so certified will have accrued upon presentation of an interim certificate to the employer, payment thereof may not be enforced until expiry of the period of 21 days' (see p 64H). His Lordship emphasized the seriousness for the honouring of the interim certificate under cl 26(1)(a) which allowed the builder to determine the contract or to suspend works if the H employer did not pay the certified sum. Similarly, in our case, the right will have accrued immediately upon issuance of the certificates concerned, however, payment thereof may only be enforced until expiry of the period of 30 days. The question called for determination in *Dr Leela*'s case was, similar to our case, the construction to be given to an interim certificate issued in connection with the construction industry as to when the amount certified therein became due and payable. Although *Dr Leela*'s case was an O 14 I application, I will adopt the ratio decidendi there to our case here, as the issue involved is the construction of similar words used in the same construction industry.

As I have indicated earlier, the plaintiff is also seeking to set off against its debt which is founded on the interim certificates issued by the architect. My perusal of cl 30 of exh PMK 2, the building contract, in particular cl 30.3 gives no such right to set off, and since the interim certificate is enforceable upon the expiry of the time stated in the appendix, the defendant has every right to enforce it. In my view, this clearly indicates the lack of a bona fide dispute on the indebtedness of the plaintiff.

The plaintiff's right to file an injunction in this case is never questionable and it does not have to wait for the actual petition for winding up to be filed and served on them (*Instrument Engineering Sdn Bhd v Sensor Link Sdn Bhd* [2001] 1 MLJ 127). In *Ford's Principles of Corporation Law* (6th Ed) by HAJ Ford and RP Austin (at p 818) it was stated:

> An application for winding up even if subsequently dismissed as being ill founded, can damage a solvent company's reputation. For that reason a company may be able to persuade the court at an early stage, before the filing of an application, to issue, in exercise of its inherent jurisdiction to restrain filing or advertisement or both as an abuse of the court's process.

Likewise, the defendant who has duly served a s 218 notice has every right to file a winding up petition the moment there is failure to pay within 21 days, as by then, the plaintiff is deemed to be unable to pay its debt under s 218(2)(a) of the Act.

Be that as it may, it is contended by the defendant that to grant an injunction under the circumstances of this case would be oppressive to the defendant as the injunction will be perpetual in its effect. The plaintiff has not given any undertaking of any sort that it will ever file any action against the defendant and has not even dememed it fit to suggest so in its affidavit. I am in concurrence with the defendant and since an injunctive relief is discretionary in nature, the court has the discretion to tilt the scales according to the justice and equity of the matter. In this respect, the popular maxim of those seeking equity must come with clean hands is aptly applicable in considering the conduct of the plaintiff in bringing this action. The plaintiff's affidavit has failed to disclose certain material facts which in the opinion of this court ought to be disclosed by the plaintiff. In my view, the failure of the plaintiff to disclose its admission of indebtedness calls for some consideration and in that respect, this court is of the view that such conduct on the part of the plaintiff has certainly adversely affected the plaintiff's application for this injunctive relief. The plaintiff, in my view, has not been forthright in failing to mention anything about its admission of the indebtedness and has failed to make a full and frank disclosure about that material fact. Such conduct certainly does not augur well for a person who is seeking equity.

I shall now turn to one other issue which is of no less importance which involves the consideration of exhs PMK 46 and PMK 47 exhibited in the defendant's second affidavit in reply, affirmed by one Phoo Meng Khaw on 10 January 2002 (encl 17). PMK 46 is a letter dated 20 October 2001 from the plaintiff addressed to the defendant made on a 'without prejudice' basis, suggesting some form of settlement pertaining to the debt owed to the defendant.

A The other exh PMK 47 is a letter dated 24 October 2001 from the defendant to the plaintiff also indicating some form of settlement proposal which was purportedly discussed and agreed between the parties. The said letter was also made on a 'without prejudice' basis. It was submitted by the counsel for the defendant that these exhibits are clear admissions of debt by the plaintiff. Counsel for the plaintiff objects to the admissibility of these B two documents on the ground that they are made on a 'without prejudice' basis and ought not to be relied upon. Counsel for the defendant argues that by introducing exh NR 2 in the plaintiff's 'affidavit balasan plaintif' affirmed by the one Nawab Rajah bin KAM Abdul Kader on 1 January 2001 (encl 10), the plaintiff has waived the privilege attached to the documents. The draft deed of settlement and the guarantee cum indemnity agreement C exhibited as exh NR 2 in the said enclosure were also made on a 'without prejudice' basis, and it was the plaintiff who first introduced those documents. Having heard the submissions of both counsel over the issue, and on the authority of *Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors* [1999] 5 MLJ 449 and *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* D [1991] 3 MLJ 4, I hold that there was a waiver on the part of the plaintiff when it first introduced the 'without prejudice' document in encl 10, and accordingly these 'without prejudice' documents in both encll 10 and 17 are admissible. In my view, the exhibits marked PMK 46 and PMK 47 speak volumes of the plaintiff's debt.

E Counsel for the plaintiff also seeks to draw a distinction on the basis that at the time the injunction was filed, there was no suit pending (in this case, the winding up petition) as opposed to what happened in *Natseven TV Sdn Bhd* and *Perpetual Plantations of Australia Ltd v United Tree Farmers Ltd* (1993) 10 ACSR 82. In my view, that is not a good ground to distinguish those cases. The principle established in those cases must be followed. It is F certainly not true to say, as the plaintiff had contended, that this court will be setting a bad precedent for future litigants and will open the floodgates for future litigants to abuse the process of court whereby if one party files an injunction application after receiving a s 218 notice to stop a winding up petition from being presented, all the other party has to do is simply file a winding up petition before the hearing date of the injunction. It must be G remembered that each application for an injunctive relief must be looked into and decided upon its own merits, and I would not go so far as to suggest that an injunctive relief can be simply stopped by filing a winding up petition and get it heard before the injunction application is set down for hearing. I am constrained to hold such an argument as being preposterous.

H Having considered all the evidence before me, and after perusing the submissions made by both counsel, I find comfort in citing a passage from the judgment of his Lordship Low Hop Bing J in *Natseven TV Sdn Bhd* at p 729:

> In *Perpetual Plantations of Australia Ltd v United Tree Farmers Ltd* (1993) 10 ACSR 82, the defendant (United) presented proceedings to wind-up the I plaintiff (Perpetual). Perpetual applied for an injunction restraining United from, inter alia, continuing with the winding up petition. One of the central issues there was whether the balance of a particular debt was presently due

and payable. The grounds proffered by Burley J in refusing the application for injunctive relief may be summarized as follows:

(1) the dispute as to whether the sum was due and payable should be best resolved in the winding up court;

(2) the company may seek an injunction in the winding up court instead of commencing separate proceedings to restrain winding up proceedings;

(3) to allow an interim injunction in a court, other than the winding up court, to restrain winding up proceedings, would be 'to encourage litigants to commence a multiplicity of proceedings where the same were not necessary.

Having had the opportunity to perusing the well-considered judgment of Burley J, I am in entire agreement with the reasoning expounded therein. In addition, I would observe that *Perpetual Plantatiosn of Australia Ltd v United Tree Farmers Ltd*, is in consonance with our s 221(1), which confers jurisdiction on the winding up court to stay winding up proceedings and so the most appropriate forum to decide whether or not winding up proceedings should continue should be the winding up court.

I am of a similar view. Accordingly, on the reasons given above, I hold that the plaintiff's application for injunction must fail and I therefore I dismiss it with costs.

Application dismissed.

Reported by Lim Lee Na